

stuff

Dotcom raid legal, FBI taking evidence

Gulliver and Johnston, 2014

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The Court of Appeal has ruled that the raids on Kim DotCom's mansion were legal - however the removal of electronic goods was an unauthorised breach.

Police raids on Kim Dotcom's mansion in 2012 have been declared legal, but FBI removal of electronic information seized in the search was an unauthorised breach, the Court of Appeal has found.

- **Court of Appeal judgment: Her Majesty's Attorney-General v Kim Dotcom (.pdf)**

Dotcom's legal team was reviewing the rulings, and would likely seek leave to appeal to the Supreme Court over the validity of the warrants, the internet tycoon's lawyer Ira Rothken said.

Police executed search warrants on the properties of Dotcom and computer programmer Bram van der Kolk on January 20, 2012, seizing 135 electronic items including laptops, computers, portable hard drives, flash storage devices and servers.

In a judgment released today, the Court of Appeal said the warrants were executed at the request of the United States Department of Justice which is seeking the extradition of Dotcom, van der Kolk and others to face trial on a number of charges including breach of copyright and money laundering involving "substantial sums of money".

The High Court ruled last June the search warrants executed on Dotcom's mansion at Coatesville in Auckland's rural north, were invalid because they were not sufficiently specific.

Justice Winkelmann ruled the search warrants "did not adequately describe the offences to which they related" and "authorised the seizure of such very broad categories of items that unauthorised irrelevant material would inevitably be captured".

No offence was identified in the warrants which merely referred to "breach of copyright" - an offence in the United States, but there is no criminal offence of breach of copyright in New Zealand.

The warrants also did not stipulate which country's laws the alleged offence was committed under, Justice Winkelmann found.

The other defects went "to the heart of the warrants and could not be properly categorised as minor", she ruled.

The attorney-general appealed this decision, acknowledging the search warrants were "far from perfect", but that leading authorities required the court to adopt a "common-sense approach taking into account the particular circumstances of the case".

In its judgment today, the Court of Appeal said that while the warrants were defective in some respects, the deficiencies were not sufficient to mean they should be nullified.

Dotcom and the other respondents would have understood the nature and scope of the warrants, especially in light of their arrest warrants – which were not defective - and the explanations given to them by the police when the properties were searched, the Court of Appeal found.

In these circumstance, no miscarriage of justice occurred.

"[We] are satisfied that the defects in the search warrants have not caused any significant prejudice to the respondents beyond the prejudice caused inevitably by the execution of a search warrant," the Appeal Court judgment said.

In relation to the electronic information, the court said the police wrongly permitted the FBI to take to the United States copies of some of the electronic items seized in the raid.

In June the High Court ruled the removal of the copies of the electronic items was in breach of the solicitor-general's direction to the commissioner of police that the items were to remain in the commissioner's "custody and control" until further direction.

The Appeal Court dismissed the Attorney-General's appeal on that matter, and held the removal was unlawful and contrary to the solicitor-general's direction.

None of the other issues relating to Dotcom currently before the courts were dealt with by the Court of Appeal's judgment today.

POLITICAL REACTION

Prime Minister John Key said the case would drag on well past the election.

"What the Court of Appeal has found is that the police search warrants were valid. The only point I would make is there are going to be a lot of twists and turns in terms of litigation with Mr Dotcom. These matters are highly likely to be appealed so we'll just leave it at that."

He said the ruling proved the police were correct when they said the mistakes they made in relation to the raids were "form over substance".

"One of the major arguments were that the police acted in an invalid way that's just not the finding of the Court of Appeal.

The case would likely not be done before the election, he said.

"If somebody wants to appeal an extradition and take legal action at every nook and cranny then it can take a very long time."

Key would not say whether the finding increased the likelihood of Dotcom being extradited.

Green Party co-leader Russel Norman, who last week called the case against Dotcom flawed and said he would move to block any extradition, refused to say whether the verdict had changed his view.

The case had a long way to go "and I'm not going to get into every twist and turn of it".

"It's not really a matter for me, obviously it's between the Crown and Kim Dotcom."

His comments last week were based on the information available to him at the time and he would not reconsider those until the court process was complete.

"There will no doubt be new facts arise over the course of the year ... Let's see what happens over the course of the year and then we'll see what's going on."

DOTCOM EXPLAINED

Kim Dotcom's legal case is made up of four separate strands in four different courts and it's got a long way to go yet, so here's a bluffer's guide.

1. Disclosure: Kim Dotcom's lawyers want to know what evidence the US Government has against him. The US says "disclosure" of evidence isn't required for an extradition hearing. Although the High Court ordered the evidence to be handed over, the Court of Appeal overturned that decision. This argument is now awaiting a ruling by the Supreme Court.

2. Search and Seizure: Last year, the High Court ruled the search warrants used in the January raid on Dotcom's house were too broad, and therefore illegal. Today, that was overturned and the Court of Appeal ruled that while the warrants were defective, they were legal. However, the Appeal Court judges agreed data taken from Dotcom, "cloned", and given to the FBI was unauthorised. Dotcom is likely to take the search warrant decision to the Supreme Court as overturning it could help with his extradition case.

3. Compensation from police and the GCSB: This is related to the search and seizure. Dotcom's team are effectively suing police and the spy agency for \$6m for illegally monitoring his communications, then searching his home and taking his property. While today's judgement undermines part of this case - the use of unlawful warrants - Dotcom could still sue for the spying, the unlawful removal of data, and what he believes were "over-the-top" tactics and human rights breaches by the police during the raid.

4. The Extradition: Originally set down for March 2013, due to the myriad of complications in the case, the extradition has now been moved to later this year, with further delays likely. Usually extradition hearings are relatively straightforward, but don't cross your fingers in this case.

•TIMELINE

2010

Kim Dotcom, an internet businessman with old convictions for hacking and insider trading (wiped under Germany's clean-slate law), applies for New Zealand residency. Rents mansion of Chrisco founder Richard Bradley in Coatesville.

November: Granted residency.

2011

Early 2011: FBI asks NZ to help investigation of Dotcom's file-sharing business Megaupload.

December 2011: GCSB spies on Dotcom at request of police.

2012

January 20: Armed raid on Dotcom's home. He, Finn Batato, Mathias Ortmann and Bram van der Kolk arrested. FBI accuse him of half-billion-dollar copyright theft. He denies it.

February 16: Ofcanz and GCSB debrief; police raise concerns surveillance may have been illegal because of permanent residency status.

February 22: Dotcom is granted bail.

February 27: GCSB's lawyer concludes surveillance was lawful.

June 28: In the New Zealand High Court, Justice Helen Winkelmann rules the raid on the Dotcom mansion was illegal.

August 10: Ofcanz's Detective Inspector Grant Wormald tells High Court about a "mystery group" of officials at

December 14 meeting.

August 16: Deputy PM Bill English signs certificate suppressing GCSB involvement in Dotcom raid. The fact gets out anyway.

September 13: GCSB says it became aware the spying was illegal.

September 17: Key launches an inquiry, headed by Inspector-General of Intelligence Paul Neazor.

September 24: Crown files memorandum confirming GCSB involvement. Key goes public.

September 27: Key apologises to Dotcom after Neazor says GCSB surveillance was illegal as Dotcom is NZ resident.

September 28: Greens' Russel Norman lodges complaint with police over GCSB.

October 1: Cabinet Secretary Rebecca Kitteridge begins review of GCSB.

All year: Numerous legal hearings in NZ and US over bail conditions, the legality of the raid and attempts to extradite Dotcom.

2013

January 20: Dotcom launches his new "Mega" file-storage business, with a celebrity-studded party.

March 7: The Court of Appeal rules Dotcom can sue the GCSB and NZ police, upholding a previous High Court decision.

April 3: Scrutiny of GCSB head Ian Fletcher reveals he got the job after an approach by Key. The pair were childhood friends.

April 8: Fairfax's Andrea Vance reveals details from leaked copy of Kitteridge's report into GCSB, which says more than 80 people may have been illegally spied on.

April 9: Kitteridge Report officially released.

June 9: CIA whistleblower Edward Snowden reveals Prism surveillance programme by American NSA. Dotcom talks up links between GCSB and NSA.

July 3: Dotcom appears at select committee hearings on proposed law to let GCSB spy on NZers. Dotcom and Key trade insults.

July 30: Dispute over evidence disclosure reaches the New Zealand Supreme Court.

August 21: New Zealand Government rushes through law change giving GSCB powers to spy on NZers.

2014

January 15: Dotcom unveils a logo revealing his political venture, the Internet Party.

February 19: The Court of Appeal deems the raids on the Dotcom mansion to be legal.

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